

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM RHODES,	§	
	§	No. 79, 2010
Claimant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
DIAMOND STATE PORT	§	C.A. No. 09A-04-005
CORPORATION,	§	
	§	
Employer Below,	§	
Appellee.	§	

Submitted: June 23, 2010

Decided: July 29, 2010

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

ORDER

This 29th day of July 2010, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. This is an appeal from a decision of the Superior Court affirming the denial by the Delaware Industrial Accident Board (“IAB” or “Board”) of William Rhodes’¹ Petition to Determine Compensation Due. Rhodes advances two claims on appeal. The first is that the Superior Court erred in affirming the IAB’s decision, because the IAB abused its discretion by ignoring or misconstruing relevant and uncontroverted evidence. The second is that the Superior Court erred

¹ Because Mr. Rhodes is deceased, his estate filed the petition on his behalf. For ease of reference, the petitioner is referred to as “Rhodes.”

in affirming the IAB's decision because the IAB misapplied, or failed to apply, the "last injurious exposure" rule.² We find no merit to either argument and affirm.

2. Rhodes worked as a forklift operator at the Port of Wilmington from 1987 until October 19, 2006. The City of Wilmington owned the Port until late 1995, when it was sold to Diamond State Port Corp. ("DSPC"). The North American Smelting Company ("NASCO") site, which was located within the Port, was owned and operated by DSPC. A Work Plan for the Remediation & Demolition of the NASCO site was prepared by RMI Environmental, a company retained to remove asbestos from the site. That Work Plan stated that there were "significant amounts of nonstructural and structural asbestos containing materials." From 1984 to 1996, "the [NASCO site] was leased to Port tenants for vehicle maintenance and bulk storage of sodium nitrate and urea." In 1996, the NASCO site was found to be unsuitable for any use, and in 1997 the building was demolished.

3. Rhodes was diagnosed with lung cancer in December 2006. He died from the disease later that month. Rhodes had a long medical history, which included uncontrolled diabetes, HIV, lung infections, high blood pressure, a heart

² The "last injurious exposure" rule "puts the whole burden of compensation payments upon the last insurer in the case of a compensable occupational disease which developed over a lengthy period of time." *Standard Distrib. Co. v. Nally*, 630 A.2d 640, 644 n.1 (Del. 1993).

attack, and prostate surgery. Rhodes had also smoked two packs of cigarettes a day for forty years.

4. A Petition to Determine Compensation Due was filed on Rhodes' behalf, alleging that he developed lung cancer as a result of being exposed to asbestos during his employment with DSPC. The IAB held a hearing on the petition.

5. At that hearing, Rhodes' widow, Linda Peterson-Rhodes, testified that she brought lunch to her husband at work daily from 1987 until 2006, and that she believed Rhodes worked in all the warehouses, including the NASCO site. Trevor Knight, the Assistant Port Engineer from 1987 to 1994, testified that several of the Port's buildings contained asbestos, that forklift operators would spend 90% of their work days in warehouses, and that the NASCO site was used as a warehouse.

6. Rhodes' expert witness, Dr. Orn Eliasson,³ testified that a reading of Rhodes' December 2006 x-rays indicated asbestos-related interstitial fibrosis and small calcified pleural plaques, and that the combination of smoking and asbestos exposure had caused Rhodes' lung cancer. Dr. Eliasson also testified that asbestos abatement can leave friable asbestos dust residue.⁴ Dr. Eliasson reviewed

³ Dr. Eliasson is a National Institute of Occupational Safety and Health certified B-reader. B-reading is a specialized training in x-ray reading to determine the existence or non-existence of changes consistent with occupational exposure of hazardous material.

⁴ The process used to demolish the NASCO site included asbestos abatement, which is the removal of the asbestos containing materials from the building before demolition.

documents that discussed asbestos issues at the Port, and opined that the documents revealed the existence of friable asbestos at the NASCO site, and that anyone working at the NASCO site would have been exposed to “medically significant” levels of asbestos.

7. DSPC’s expert witness, Dr. Albert Rizzo,⁵ opined that Rhodes’ lung cancer was caused exclusively by cigarette smoking. Dr. Rizzo testified that there were no findings indicating to a reasonable degree of medical probability that asbestos exposure had contributed to Rhodes’ lung cancer. Dr. Rizzo also testified that none of Rhodes’ treating physicians or radiologists had noted interstitial fibrosis, pleural plaques or pleural thickening on any of the diagnostic reports.

8. The IAB denied Rhodes’ petition. Rhodes appealed to the Superior Court, contending that the IAB had abused its discretion by ignoring relevant evidence, and had committed legal error by misapplying the “last injurious exposure” rule. The Superior Court affirmed the IAB’s decision, and this appeal followed.

9. Rhodes contends that the IAB disregarded relevant and un rebutted evidence. We review the IAB’s factual findings to determine whether they are

⁵ Dr. Rizzo is not a National Institute of Occupational Safety and Health certified B-reader.

supported by substantial evidence,⁶ which is “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.”⁷ This Court does not “sit as the trier of fact nor do we have the authority to weigh the evidence, determine questions of credibility, or make factual findings and conclusions.”⁸ We review the record “in the light most favorable to the party prevailing below, resolving all doubts in its favor.”⁹ “Only when there is no satisfactory proof in favor of a factual finding of the Board may the Superior Court, or this Court for that matter, overturn it.”¹⁰

10. It is well-settled law that the Board may accept the opinion testimony of one expert and disregard a different expert’s conflicting opinion.¹¹ Moreover, “an award cannot stand on medical testimony alone, if the medical testimony shows nothing more than a mere possibility that the injury is related to the accident.”¹² It

⁶ *Steppi v. Conti Electric, Inc.*, 991 A.2d 19 (Table), 2010 WL 718012, *2 (Del. Mar. 16, 2010); *Glanden v. Land Prep Inc.*, 918 A.2d 1098, 1100 (Del. 2007).

⁷ *Steppi*, 2010 WL 718012, at *2.

⁸ *Id.*

⁹ *Id.* (quoting *Gen. Motors Corp. v. Guy*, 1991 WL 190491, *3 (Del. Super. Aug. 16, 1991)).

¹⁰ *Id.* (quoting *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

¹¹ *Id.* at *3 (citing *Standard Distrib. Co. v. Nally*, 630 A.2d at 646).

¹² *Id.* (quoting *Gen. Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960)).

is the petitioner's burden to establish by a preponderance of the evidence that the injury sustained was caused by occupational exposure to asbestos.¹³

11. The IAB determined that the petitioner failed to meet his burden. Rhodes and DSPC presented conflicting testimony about what caused Rhodes' lung cancer. Dr. Eliasson opined that occupational exposure to asbestos was a cause of Rhodes' lung cancer, while Dr. Rizzo opined that the cancer was caused exclusively by cigarette smoking. The IAB found Dr. Rizzo's testimony to be more credible than that of Dr. Eliasson. The IAB also articulated a reasonable basis for its determination:

For several reasons, the Board found Dr. Rizzo's causation opinion more persuasive than Dr. Eliasson's opinion. First, Dr. Eliasson's causation opinion is based upon the unsubstantiated conclusion that [Rhodes] was exposed to friable asbestos while working at the NASCO site at the Port of Wilmington in 1995 and 1996. Dr. Eliasson even went so far as to characterize [Rhodes'] asbestos exposure as "very significant." Yet, upon closer examination of his testimony, it is clear that *he did not know when or if [Rhodes] even worked at the NASCO site....* [I]t is clear from his cross-examination testimony, that Dr. Eliasson did not know whether [Rhodes] worked at the NASCO site and he had no information regarding asbestos contamination at the Port outside of the NASCO Building¹⁴

¹³ 29 Del. C. § 10125(c); see *Anderson v. General Motors Corp.*, 442 A.2d 1359, 1361 (Del. 1982).

¹⁴ Board Decision at 4 (emphasis in original).

It is clear from Dr. Eliasson’s testimony that [Rhodes] was “relatively healthy” that he did not have a full understanding of [Rhodes’] prior medical history and the other potential risk factors that could have caused the alleged abnormalities demonstrated on [Rhodes’] diagnostic studies.¹⁵

12. Rhodes contends that the IAB ignored unrebutted evidence of friable asbestos at the NASCO site, and also mischaracterized witness testimony. The IAB’s decision focused on the absence of evidence that Rhodes was exposed to asbestos at the NASCO site. The IAB observed that Trevor Knight’s testimony indicates, at best, that Rhodes *may* have worked at the NASCO site before the transfer of ownership in 1995.¹⁶ The IAB also found Mrs. Rhodes’ testimony to be unpersuasive. Mrs. Rhodes testified that she *believed* that Rhodes worked in many of the warehouses, including the NASCO site. But, she did not testify that Rhodes *actually* worked in the NASCO site between 1995 and 1996. The IAB’s decision was supported by “the minimum quantum of evidence required.”¹⁷

13. Rhodes also claims that the IAB misapplied the “last injurious exposure” rule—a claim that we review *de novo*.¹⁸ The IAB found that Rhodes failed to demonstrate that he was exposed to asbestos while working at the Port of

¹⁵ Board Decision at 6.

¹⁶ Trevor Knight did not work at the Port of Wilmington after 1994.

¹⁷ *Steppi*, 2010 WL 718012, at *3.

¹⁸ *Id.* at *2 (citing *Scheers v. Indep. Newspapers*, 832 A.2d 1244, 1246 (Del. 2003)).

Wilmington for DSPC. Alternatively, even if Rhodes was exposed to asbestos that remained after the abatement process, the IAB credited Dr. Rizzo's opinion that the medical evidence and findings do not establish, to a reasonable medical probability, that asbestos exposure contributed to Rhodes' cancer.¹⁹

14. Thus, the "last injurious exposure" rule does not apply, because Rhodes failed to prove injurious exposure while working for DSPC. "The last injurious exposure rule provides, generally, that where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employments, the most recent employer where the worker was exposed is liable for the entire award."²⁰ Although injurious exposure need not be prolonged, or in itself be sufficient to cause the disease, such exposure must be "of the type which could cause the disease given prolonged exposure."²¹ In *Lake Forest School District v. DeLong*,²² the Superior Court held that, where the claimant died of mesothelioma and the building in which the claimant worked contained asbestos, a sufficient causal relationship existed between the exposure

¹⁹ The IAB was persuaded by the following: (1) none of Rhodes' treating physicians ever opined that Rhodes' lung cancer was caused by asbestos exposure; (2) Dr. Rizzo testified there are other causes of pleural thickening and interstitial fibrosis (including chronic lung infection), and that Rhodes did not have mesothelioma, which is the type of cancer almost certainly linked to asbestos exposure; and (3) both experts agreed that Rhodes smoked two packs of cigarettes a day and that the type of cancer Rhodes had may be caused by cigarette smoking.

²⁰ *Lake Forest Sch. Dist. v. DeLong*, 1988 WL 77665, at *3 (Del. Super. Ct. Jul. 20, 1988).

²¹ *Id.*

²² *Id.*

and the disease to establish the last injurious exposure. Here, in contrast, the IAB acted within its discretion when finding that Rhodes had not established that he was exposed to asbestos while working at the Port of Wilmington. Moreover, there was sufficient evidence for the IAB to accept Dr. Rizzo's opinion that cigarette smoking alone caused Rhodes' lung cancer.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice